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SUPREME COURT, U.S.

No. 82-1479

In the Supreme Court of the United States

October Term, 1982

Justices of the Boston Municipal Courts

Petitioners

v.

Michael Lydon,

Respondent

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On Petition for Certiorari to the United States Court of Appeals

for the First Circuit

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# RESPONDENT'S OPPOSITION TO PETITION FOR CERTIORARI

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No. 82-1479

In the Supreme Court of the United States
October Term, 1982

Justices of the Boston Municipal Court
Petitioners
v.
Michael Lydon
Respondent

Respondent's Opposition to Petition for Certiorari

Michael Lydon, the respondent, urges that this Court deny certiorari to review the decision of the First Circuit, reported at 698 F.2d 1 (1982).

Statement of the Cases: Omitted Facts

The petition omits a number of facts which were a part of the record in the District Court. Mr. Lydon faced a charge of possession of burglarious implements, and chose to waive his right to an initial jury trial. He was never informed that a consequence of his choice would be to permit the prosecution to convict him on inadequate evidence and then obtain an opportunity to bolster its case if he appealed for a trial de novo.

Having been convicted at his initial trial despite his claim of insufficient evidence, Mr. Lydon exercised the only option Massachusetts law gave him - a trial de novo. Before the de novo judge, Mr. Lydon moved to dismiss the case on Double Jeopardy grounds, relying on Burks v. United States, 437 U.S. 1 (1978). The motion was denied without a hearing.

Mr. Lydon continued to pursue his claim, by seeking relief from a Single Justice of the Supreme Judicial Court. The Single Justice stayed the trial and considered the Double Jeopardy question. In its brief before the Single Justice, the Commonwealth conceded that the evidence at Mr. Lydon's trial was insufficient to support a conviction. The Single Justice wrote

an opinion in which he stated "I am of the view that the evidence was not sufficient to warrant guilty findings." The opinion went on to distinguish Lydon's case from others which also raised the Double Jeopardy implication of Burks for the trial de novo system, but where the record showed the evidence to pass constitutional muster. Having reviewed the transcript of Lydon's trial and found the evidence insufficient, the Single Justice ruled that Mr. Lydon's case squarely presented the Double Jeopardy issue, which he reported to the full bench.

The Supreme Judicial Court rejected Mr. Lydon's claim in a 5-2 decision, Lydon v. Commonwealth, 409 N.E. 2d 745 cert. denied 449 U.S. 1065 (1980), accompanied by two companion cases raising similar claims which arose before the Massachusetts Court Reorgainzation Act of 1978. Gibson v. Commonwealth, 409 N.E. 2d 741 cert. denied 449 U.S. 1089 (1980); A Juvenile v. Commonwealth, 409 N.E. 2d 755 cert. denied 449 U.S. 1062 (1980). This Court denied certiorari on December 15, 1980.

The original stay which had been in effect since February 5, 1980 continued until May 12, 1981, when the Supreme Judicial Court finally issued its judgment and remanded Mr. Lydon's case for trial. The case remained dormant in the state courts, and Mr. Lydon filed a habeas corpus petition in federal court on September 10, 1982. The District Court granted the writ on April 13, 1982 and the First Circuit affirmed that decision on December 30, 1982. At no time did the Commonwealth ever request a federal court to postpone habeas review until it could conduct Mr. Lydon's second trial.

## SUMMARY OF ARGUMENT

The Court of Appeals narrowly confined both the jurisdictional and substantive aspects of its decision. Therefore, this case presents an issue of such limited impact that it does not justify granting certiorari.

In allowing a habeas corpus petition to challenge a pending state criminal trial on Double Jeopardy grounds, the Court of Appeals was following a consistent line of authority including a case from this Court, Arizona v. Washington,

434 U.S. 497 (1978). The protection against Double Jeopardy is unique in requiring vindication prior to a trial. The decision was confined to cases raising such claims. Moreover, it restricted its holding to the type of unusual circumstances which Mr. Lydon presented. Mr. Lydon's claim arising from Burks v. United States, 437 U.S. 1 (1978) rested on the contention that the evidence at his initial trial was insufficient as a matter of law to support a conviction. The prosecutor in the state courts conceded this issue. Moreover, the highest state court fully considered the constitutional implications of Mr. Lydon's claim. Finally, the state's conduct throughout the course of the litigation evidenced a lack of concern for proceeding speedily with Mr. Lydon's trial de novo. The Court of Appeals weighed all of these factors in concluding that federal intervention was appropriate.

No other case holds that habeas corpus would be inappropriate under such circumstances. The cases the petition cites as conflicting with the Court of Appeals' decision simply demonstrate that habeas corpus may not be warranted when the petition presents a different type of claim than Mr. Lydon's. These decisions are consistent in their reasoning with the Court of Appeals. Other cases the petition cites arise in a context-interlocutory review - that applies a wholly different jurisdictional test than habeas corpus. They rest on a conclusion that the claim at issue is subsumed in the merits of the litigation, rather than being collateral. This distinction is irrelevant to habeas corpus jurisdiction.

As far as the substantive Double Jeopardy ruling the court rendered, its impact is extremely limited as well. The decision clearly indicated that in the future, all a state need do to avoid the problem it encountered with Mr. Lydon is to add a sentence to a waiver form, giving defendants notice that they must abandon the protection of Burks to obtain the benefit of participating in a de novo system.

Certiorari is also inappropriate because the decision is clearly correct. Even the dissenting opinion conceded the logic of the result. Burks held that the Double Jeopardy Clause prohibits a prosecutor from a second bite at the apple when the evidence at the defendant's first trial was so deficient that

no rational person could conclude that a conviction was proper. This principle lies at the heart of Double Jeopardy's protection. The state may have only one fair chance to obtain a conviction.

The Court of Appeals simply applied this proposition to the trial de novo system. This Court had already held that Double Jeopardy applies in the same way to trial de novo as it does elsewhere. Ludwig v. Massachusetts, 427 U.S. 618 (1976). Mr. Lydon's choice of participating in the de novo system did not strip him of his Double Jeopardy protection, because the record demonstrated that there was no evidence of any sort of waiver. Quite to the contrary, the most reasonable conclusion is that Mr. Lydon affirmitively intended to rely on Burks from the very beginning of his case in the state courts.

## ARGUMENT

### I. The Unusual Circumstances and Limited Holding of This Case Make It Inappropriate for Certiorari.

#### A. The decision of the Court of Appeals that federal habeas corpus intervention was proper is confined to such limited circumstances that it presents neither a departure from established policy nor a threat to the independence of state courts.

It is settled federal policy to allow pre-trial habeas corpus petitions to raise a valid double jeopardy claim against a pending state criminal case. This Court has considered the merits of just such a habeas corpus petition. Arizona v. Washington, 434 U.S. 497 (1978). Indeed, federal adjudication of these types of claims has uniformaly been approved.[1]

The decision of the Court of Appeals recognizing federal habeas corpus jurisdiction was well within this mainstream. If anything, the court's opinion limited the scope of federal intervention beyond the general rule. Judge Breyer carefully restricted the court's holding to the type of unusual circumstances which this case presented:

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1 Sedgwick v. Superior Court, 584 F.2d 1044, 1045 (D.C. Cir. 1978) cert. denied 439 U.S. 1071 (1979) Brady v. Samaha, 667 F.2d 224 (1st Cir. 1981); Drayton v. Hayes, 589 F.2d 117, 120 (2d Cir. 1979); Russo v. Superior Court, 483 F.2d 7 (3rd Cir.) cert. denied 414 U.S. 1023 (1973); Baker v. Metcalfe, 633 F.2d 1198, 1200-01 (5th Cir. 1981); cert denied 451 U.S. 974 (1982); Gully v. Kunzman, 592 F.2d 283, 287 (6th Cir.) cert. denied 442 U.S. 924 (1979); Burris v. Ryan, 397 F.2d 553 (7th Cir. 1968); Arizona v. Washington, 546 F.2d 829 (9th Cir. 1977) reversed on other grounds 434 U.S. 497 (1978).

> The case before us is one in which...the need for postponement of habeas review is minimal. We therefore restrict our holding to such a case. We conclude that habeas review...was proper at this time in the case before us. But, we specifically decline to extend our holding to other cases not characterized by the several factors favoring review listed here. We postpone to another day any authoritative decision about "habeas timing" in such other cases. Lydon v. Justices of the Boston Municipal Court, 698 F.2d 1, 7 (1st Cir. 1982).

The decision therefore hardly presents an issue of such wide ranging importance to the proper relationship between federal and state courts that it justifies granting certiorari.

Because of the highly idiosyncratic nature of this case, the Court of Appeals' decision will not enlarge the number of state criminal defendants who can successfully seek federal habeas corpus prior to their trials in state court. The first distinguishing feature of this case that limits its impact is the nature of the constitutional violation which the habeas corpus petition presented.

Mr. Lydon's petition advanced a double jeopardy claim relying on Burks v. United States, 437 U.S. 1 (1978). The Court of Appeals in Lydon made clear that it is only the unique nature of a Double Jeopardy claim that makes pre-trial intervention appropriate. Since the Double Jeopardy clause protects a defendant from even having to undergo a second trial, see Green v. United States, 355 U.S. 184, 187-88 (1957), he must obtain relief before his retrial or suffer the very injury the Constitution prohibits. Other constitutional rights do not require as a remedy, shielding a defendant from simply participating in a criminal tiral. Cf. United States v. MacDonald, 435 U.S. 850, 860 n.7 (1978) (Double Jeopardy claims are paradigmatic).

Moreover, the Court of Appeals' decision wil not open the door to pre-trial habeas corpus jurisdiction whenever a petition merely alleges a Double Jeopardy violation. The opinion took into account the comity priniciple of Younger v. Harris, 401 U.S. 37 (1971) by

indicating that federal intervention in ongoing state proceedings should be reserved for those cases that present "a strong showing of likely success on the merits." Lydon, Supra, 698 F.2d at 6. This was just such a case.

Mr. Lydon's Double Jeopardy claim was predicated upon the allegation that the evidence at his initial trial in the state courts was insufficient as a matter of law to support a conviction. The record before the District Court established that the prosecutor in the state courts conceded that the evidence at Mr. Lydon's trial was insufficient. In addition, the proceedings in the state courts made clear that at the very least, no state court judge who considered the Double Jeopardy claim seriously questioned the conclusion that the initial trial improperly convicted Mr. Lydon.

Thus, the Court of Appeals' decision stands for the narrow proposition that only meritorious claims based on a Double Jeopardy violation warrant pre-trial habeas corpus review. Neither habeas corpus petitions raising other consitutional issues nor frivolous Double Jeopardy claims will be open to the type of federal review which the Court of Appeals held applicable to Mr. Lydon.

The second distinguishing feature of this case that limits its significance is the lack of any showing by the state of a need to postpone habeas review. The Court of Appeals took pains to point out that the Commonwealth's actions throughout the course of litigation in state and federal courts indicated that it felt there was no need for a speedy trial in the pending state criminal matter. Moreover, the Supreme Judicial Court of Massachusetts had already fully considered the merits of Mr. Lydon's Double Jeopardy claim. Thus, for a federal court to exercise its habeas corpus jurisdiction did not deprive the state courts of the opportunity to consider the constitutional issue in the first instance, nor did it delay a trial the state wanted to pursue.

Thus, viewed in context, the Court of Appeals' decision will have no significant impact on the scope of federal habeas corpus jurisdiction. Evidence of the minor effect it will have comes from the petition in this case. As Attorney General for the Commonwealth of Massachusetts, counsel for petitioners is in a position to know of every pre-trial habeas corpus case raising the same claim as Mr. Lydon. The petition is able to cite, at p.29, only two cases which have arisen after the date of the District Court decision granting Mr. Lydon habeas corpus relief. There have probably been several hundred thousand cases completed in the first tier of the Massachusetts de novo system during that time.[2] The result of Mr. Lydon's federal litigation has hardly been a floodgate. It barely qualifies as a trickle.

B. The decision of the Court of Appeals creates no conflict among the circuits on the scope of habeas corpus jurisdiction.

The Court of Appeals' decision does not conflict with any other decided federal case. The cases from the Fifth and Seventh Circuits petitioner cited as evidence of a conflict are, to the contrary, consistent with the reasoning of the court's decision.

Kolski v. Walton, 544 F.2d 762 (5th Cir. 1977), cited at p.20 of the petition, merely establishes that comity and federalism require a federal court to abstain from pre-trial habeas corpus interference with a pending state action when the petition raises a challenge to the constitutionality of the substantive state criminal statute. The opinion intimates nothing about the appropriateness of pre-trial

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2 Cf. 1981 Annual Report of the Massachusetts Trial Court, pp.28, 39 (10,231 criminal complaints disposed of in Fiscal Year 1980 in Boston Municipal Court; 478,695 criminal complaints disposed of in Fiscal Year 1980 in all other District Courts).

habeas corpus in a case raising a Double Jeopardy claim. Since a defendant can litigate a challenge to the constitutionality of a criminal statute after conviction without suffering the irreparable harm that attends a Double Jeopardy claim, Kolski is consistent with Lydon.

Stevens v. Circuit Court, 657 F.2d 946 (7th Cir. 1982), cited at p.20 of the petition, is also consistent with the principle of the Lydon decision, but simply reached a different result because of different factual circumstances. In Stevens, the petitioner based his Double Jeopardy claim on the fact that his pending state trial was barred by a prior conviction for crimes to which he had pled guilty. The Seventh Circuit withheld habeas corpus relief because even if the petitioner's Double Jeopardy claim were meritorious, he would not suffer the harm of undergoing two trials. The opinion clearly implied that had the petitioner's first conviction been after trial - as Lydon's - pre-trial habeas corpus would be appropriate. Thus, Stevens actually supports the First Circuit's conclusion.

The Court of Appeals decision also does not conflict with the cases the petition cites at page 16, dealing with the question of whether a federal defendant may take a pre-trial interlocutory appeal based on a claim that insufficient evidence at his first trial bars his retrial after the original jury failed to reach a verdict.[3]

The concept those cases applied was the collateral order doctrine of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). Cohen specifically bars interlocutory review of an issue in a federal trial if it is directly implicated in the merits of the case. The concerns of the Cohen doctrine are different from

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3. United States v. Ellis, 646 F.2d 132 (4th Cir. 1981); United States v. Ray, 641 F.2d 222 (5th Cir.) cert. denied 102 Ct. 318 (1981); United States v. Becton, 632 F.2d 1294 (5th Cir. 1980), cert. denied 102 S. Ct. 141 (1981); United States v. Carnes, 618 F.2d 68 (9th Cir.) cert. denied 100 S. Ct. 3028 (1980).

those underlying habeas corpus jurisdiction.

The collateral order doctrine applies the statute limiting federal appeals to "final decisions" in light of concerns for orderly review and judicial efficiency. Habeas corpus jurisdiction depends on questions of custody, exhaustion, and comity. In the context of an interlocutory appeal, a pre-trial Double Jeopardy claim based on insufficient evidence at a previous trial for the same offense may well fall outside the Cohen exception because it raises an issue subsumed in the merits of the pending case. That conclusion, however, would not answer the jurisdictional question in a habeas corpus context, since the issue of whether a claim is collateral or goes to the merits is not relevent there. In any event, if the resolution of the split in applying the Cohen doctrine between the cases cited in the petition and the Third Circuit in United States v. McQuilken, 673 F.2d 681 (3rd Cir. 1982) is important, the Court should undertake it in a case raising the issue directly rather than one arising in only a tangentially related context.

C. The decision of the Court of Appeals applying the Double Jeopardy Principle of Burks will have little effect on the operation of trial de novo systems.

While the Court of Appeals held that Burks v. United States, 437 U.S. 1 (1978) prohibits a state from trying a defendant in the second tier of a de novo system if his conviction in the first tier was based on insufficient evidence, the decision will have little practical impact on the operation of such state courts. The opinion clearly indicated that if a state wished to conduct a de novo system without affording defendants the Double Jeopardy protection of Burks, all it need do is inform defendants before they choose to participate in the de novo process that they must first waive the right at issue.

Indeed, some Massachusetts District Courts have adopted just such a course. (An example of a waiver form used in a Massachusetts first tier court is attached to this brief as an Appendix.)

Thus, the decision will have little effect on the future operation of state de novo systems.

## II. The Decision was Clearly Correct

### A. The Court of Appeals properly applied Burks v. United States to the Massachusetts Trial De Novo System.

In Burks v. United States, 437 U.S. 1 (1978), the Court held that the Double Jeopardy Clause bars retrial of a defendant after his conviction was reversed on appeal if the evidence at his trial fell below the minimum demanded by Due Process to support a guilty verdict. Burks is fully applicable to prosecutions in state courts. Greene v. Massey, 437 U.S. 19 (1978). Burks is based on the proposition that "(t)he Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceedings." Burks at 11. The Court has explained that this principle is essential to the protection the Clause affords. It "prevents the State from honing its trial strategies and perfecting its evidence through successive attempts at conviction. Repeated prosecutorial sallies would unfairly burden the defendant and create a risk of conviction through sheer governmental perserverance." Tibbs v. Florida, ___U.S.___ 102 S. Ct. 2211, 2218 (1982).

The same concerns exist when the prosecution seeks a forbidden second bite at the apple following an insufficient effort in the first tier of a trial de novo system. There is nothing about the trial de novo procedure which renders the Double Jeopardy Clause inoperative.

Indeed, the Court has already made clear that the same Double Jeopardy principles apply to a de novo defendant as to a defendant whose conviction is reversed by an appellate court after a review of the record. Ludwig v. Massachusetts, 427 U.S. 618, 631-32 (1976). In both situations, the Double Jeopardy Clause prevents retrial when there was insufficient evidence at the first proceeding.

The Burks principle would be an anomoly if it were confined solely to cases where an appellate court reversed a defendant's conviction, and not to other contexts raising the same question of Double Jeopardy's consequence for a retrial after an improper conviction based on insufficient evidence. The Court, in Hudson v. Louisiana, 450 U.S. 40 (1981), made clear that Burks applies in situations other than appellate reversal. In Hudson, after the defendant was convicted, the trial judge granted a motion for a new trial on the ground that the evidence was insufficient as a matter of law to sustain a conviction. This ruling called the Burks principle into play, without regard for the fact that it originated at the trial, not the appellate, level. Hudson, supra, at 45 n.6.

It is clear as well that this principle applies even if the state courts have refused to find the evidence insufficient, but a federal habeas corpus court has done so.

> Although neither Burks nor Greene specifically states that a subsequent state retrial would violate the double jeopardy clause if a federal habeas corpus court, instead of an appellate court, finds that a state conviction was based on insufficient evidence, there is no reasonable basis for concluding otherwise. It is, after all, the nature of the right, and not the nature of the reviewing court, that bars a retrial if the reviewing court finds that the original conviction was based on constitutionally deficient evidence.

Delk v. Atkinson, 498 F. Supp. 1282, 1285 (M.D. Tenn. 1980), rev'd on other grounds sub nom. Delk v. Anderson, 665 F.2d 90 (6th Cir. 1981).[4]

The Federal District Court judge in this habeas corpus case conducted his own review of the sufficiency of the evidence at Mr. Lydon's state trial. The Commonwealth has not challenged either in the First Circuit or in its petition here, his conclusion that the prosecution's case could not support a verdict of guilty under any rational view of the evidence. The District Court's determination that the prosecution failed to prove its case thus brings into play the Double Jeopardy bar of Burks.

Massachusetts cannot render meaningless the protection the Clause affords defendants simply by refusing to engage in the type of review that would reveal a Double Jeopardy violation in the first place. Since there has been a definitive judicial determination on the insufficiency of the evidence, the State may not have another opportunity to improve its position.

B. In light of the record, the Court of Appeals' conclusion that there was no waiver was clearly correct.

The Court of Appeals was clearly correct in rejecting the Commonwealth's argument that Mr. Lydon waived his rights by electing to participate in the de novo process. The right at issue is the Double Jeopardy protection of Burks, not-as the petition argues -

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4. Aside from the Sixth Circuit in Delk V. Anderson, 665 F.2d 90 (6th Cir. 1981), both the Ninth and Fifth Circuits have recognized that Burks does not depend on a prior appellate determination of evidentiary sufficiency. In United States v. Wilkinson, 601 F.2d 791 (5th Cir. 1979) and United States v. Bodey, 607 F.2d 265 (9th Cir. 1979), the courts reviewed the evidence at a defendant's first trial, after he challenged his conviction at a retrial necessitated by a hung jury. Such a review was necessary because

a right to appellate review. This Court has held that Double Jeopardy is a fundamental right which requires the exacting waiver standard of Johnson v. Zerbst, 304 U.S. 458, 464 (1938). See Green v. United States, 355 U.S. 184, 191-92 (1957); Schneckloth v. Bustamonte, 412 U.S. 218, 238 (1973).

Waiver is a matter of federal law, and a habeas corpus court is required to determine if a valid waiver of a constitutional right occurred. See Brewer v. Williams, 430 U.S. 387, 403 (1977); Alvarez v. Estelle, 531 F.2d 1319 (5th Cir. 1976). Where a fundamental right like Double Jeopardy is at issue, the state bears the burden of proof. Brewer, supra, at 404. Here, the Commonwealth made no effort to meet this requirement.

The District Court expressly found:

> There is no evidence that Lydon had a "meaningful choice" and made a "voluntary knowing relinquishment of a right," Green v. United States, 1957, 355 U.S. 184, 191-92, 78 S. Ct. 221, 225-26, 2 L. Ed. 2d 199, in submitting initially to a bench trial since it is not clear that he appreciated that in so doing he was waiving rights protected by the double jeopardy clause.

Lydon v. Justices of the Boston Municipal Court, 536 F. Supp. 647, 651 (D. Mass. 1982).

This finding was amply justified. There was nothing in the record of the case nor any feature of the Massachusetts de novo system to support a conclusion that there was a knowing waiver. Lydon v. Commonwealth, 409 N.E. 2d 745, 754 (1980) (dissenting opinion).

This Court has established a policy that "indulge(s) every reasonable presumption against waiver." Barker v. Wingo, 407 U.S. 514, 525 (1972) (emphasis added). That alone would support the conclusion of the Court of Appeals based on this record. Aside from the presumption,

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4. Burks would bar the conviction even though there had been no determination prior to the second trial that the evidence at the first trial had been insufficient.

however, it is clear that Mr. Lydon affirmatively intended to rely on the protection of the Double Jeopardy clause in choosing a first tier trial, rather than to waive it.

The state of the law prior to the Supreme Judicial Court's Lydon opinion offered defendants in the de novo system every reason to believe that they could raise a double jeopardy challenge in the second tier of the system based on the insufficiency of the evidence at their first trials. See Casenote, 16 New England L. Rev. 303, 319 (1981). Two Superior Court judges had already accepted the contention. Id. at 320 n. 133. Three Justices of the Supreme Judicial Court considered the question important enough to be reported to the full bench for decision. Lydon v. Commonwealth, supra (reported by Justice Wilkins); Gibson v. Commonwealth, 409 N.E. 2d 741 (1980) (reported by Justice Quirico); A Juvenile v. Commonwealth, 409 N.E. 2d 755 (1980) (reported by Justice Abrams). In this context, Mr. Lydon's decision to participate in the de novo system can hardly be equated with a deliberate abandonment of the protection against double jeopardy.

The record makes clear that from the very beginning Mr. Lydon was pursuing a course of action designed to preserve and advance a constitutional claim which the state courts had not yet definitively accepted. In light of the message this Court has given defense counsel in Engle v. Isaac, U.S., 102 S. Ct. 1558(1982) concerning the need to present novel constitutional claims to state courts, it would be ironic if Mr. Lydon were held to have waived his right to present such a claim merely by putting himself in the position of having to assert it in the first place.

## CONCLUSION

The dissenting opinion in the Court of Appeals began by recognizing that the majority's result may well be correct. Lydon, supra, 698 F.2d at 10 . Not only was the decision correct in a narrow logical sense, it was also correct in the sense of implementing the Double Jeopardy Clause's purpose of preventing governmental oppression. The Commonwealth of

Massachusetts should not be allowed to shore up its first attempt and try again to convict Michael Lydon. Limited in scope though it was, the Court of Appeals' decision should stand. This court should deny certiorari.

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# APPENDIX

# Commonwealth of Massachusetts
## District Court Department of the Trial Court
## Cambridge Division

FORTY THORNDIKE STREET, EAST CAMBRIDGE, MASSACHUSETTS 02141
617/494-4300

**Waiver of Right to Initial Jury Trial**

Commonwealth

vs.

_____

Complaint / No (s) _____

I have been given notice of my right to have a jury trial in the first instance. I understand this notice. I hereby waive my right to a jury trial in the first instance on the complaints listed above.

I further acknowledge and understand that in the event I am found guilty of the offense of which I stand charged, my sole recourse is a new trial before a jury for the same offense at which time the Commonwealth would not be restricted in offering the same and/or additional evidence.

By the execution of this waiver I acknowledge that I am waiving the right to assert that any re-trial would violate my constitutional right against double jeopardy.

_____ _____

Date Signature of Defendant

WITNESS:

_____ _____

Attorney for Defendant Assistant Clerk

J 25-B

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

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No. 82-1479

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Justices of the Boston Municipal Court,

Petitioners

v.

Michael Lydon,

Respondent

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Certificate of Service

I, David Rossman, a member of the Bar of this Court, hereby certify that on the 4th day of April, 1983 one copy of the enclosed motion, affidavit, and response has been mailed to the Petitioner in this case, at the address below:

Barbara A.K. Smith
Office of Attorney General
Commonwealth of Massachusetts
One Ashburton Place
Boston, Massachusetts 02108

David Rossman
Counsel for Respondent

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

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SUPREME COURT, U.S.

No. 82-1479

Justices of the Boston
Municipal Court, Petitioners

v.

Michael Lydon, Respondent

MOTION FOR LEAVE TO PROCEED BEFORE THE UNITED STATES SUPREME COURT IN FORMA PAUPERIS, WITHOUT BEING REQUIRED TO PREPAY COSTS OR FEES

Pursuant to Rule 46 of the Rules of the United States Supreme Court, motion is made by Michael Lydon, Respondent, to proceed in forma pauperis, for the reasons stated in the attached affidavit.

Respectfully submitted,

David Rossman
Counsel for Respondent
Director, Boston University Defender Program
Boston University Law School
765 Commonwealth Avenue
Boston, Massachusetts 02215
(617) 353-3131

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The Justices of the Boston Municipal Court

Petitioners,

v

Michael Lydon

Respondent

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AFFIDAVIT

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I, Michael Lydon, respondent in the above-captioned matter, swear, in support of my Motion for Leave to Proceed Without Being Required to Prepay Costs or Fees:

1. I am an indigent person, having no savings or assets and earning only $130.00 - TAXES per week to support myself and my family.

2. Because of my poverty I am unable to pay the costs of this case or to give any security therefor.

3. I believe in good faith that I am entitled to the relief and redress that I am seeking in this case.

4. The nature of this action is briefly stated as follows: I was sentenced to the Massachusetts Correctional Institution for a term of two years after being found guilty in a bench trial in the Boston Municipal Court. That trial occurred in the first tier of Massachusetts' two tier system. My claim is that the conviction was based on insufficient evidence because the Commonwealth failed to present any evidence on an element of the charge. Since I was entitled to an acquittal and did not receive one I requested a new trial before the second tier, (a de novo trial). I then filed a motion to dismiss the case because a

second trial would violate my rights under the Double Jeopardy Clause. I based this claim on this Court's decision in Burks v. United States, 437 U.S. 1 (1978). After the Massachusetts Supreme Judicial Court rejected my claim, I filed a petition for a writ of habeas corpus. The District Court granted the writ and the Court of Appeals affirmed. From this judgment the Commonwealth has sought a writ of certiorari.

5. On October 31, 1979 I was found by the Boston Municipal Court to be indigent. At that time Ms. Bonnie Hannon, a third year law student practicing under the supervision of Eva S. Nilsen of the Boston University Defender Program, was appointed by the Court to represent me.

6. On September 10, 1981 I was found indigent by the United States District Court for the District of Massachusetts, and permitted to file my habeas corpus petition in forma pauperis.

Under the pains and penalties of perjury the foregoing facts are true as stated to the best of my knowledge and belief.

Respectfully submitted,

Michael T. Lydon

Dated: March 30, 1983

Michael Lydon
Respondent

IN THE
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October Term, 1982

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Michael Lydon, Respondent

AFFIDAVIT

Pursuant to Rule 28.2 of the Rules of the United States Supreme Court, under the pains and penalties of perjury, I hereby swear that the following facts are true:

1. I am a member of the bar of this Court.

2. The enclosed Opposition to Petition for Certiorari, Motion for Leave to Proceed In Forma Pauperis and Affidavit, were hand delivered by me on Monday, April 4, 1983, a t approximately 4:00 P.M. to the United States Post Office at Boston University Station, Commonwealth Avenue, Boston, Massachusetts, 02215.

3. These documents were addressed to the Clerk's Office, Supreme Court, Washington, D.C. 20543 and were mailed first class, postage prepaid.

Respectfully submitted,

David Rossman

David Rossman
Counsel for Respondent
Director, Boston University Defender Program
Boston University Law School
765 Commonwealth Avenue
Boston, Massachusetts 02215
(617) 353-3131

Valerie M. Muehleland
Notary Public
My Comm. Exp. Oct. 25 1985